

(2012) 09 AHC CK 0222

Allahabad High Court

Case No: Criminal Appeal No. 2600 of 2006

Aslam and others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Sept. 3, 2012**Acts Referred:**

- Arms Act, 1959 - Section 25
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2012) 3 ACR 3273**Hon'ble Judges:** Y.C. Gupta, J; Vinod Prasad, J**Bench:** Division Bench

Advocate: V.P. Srivastava, Lav Srivastava, Dharmendra Vaish, V.D. Ojha, V.P. Sharma, R.P. Dubey, A.N. Singh, P.N. Misra, Dharmendra Singhal, Mohd. Abrar Khan and R. Bhargava, for the Appellant; Sanjay Dwivedi, D.R. Chaudhary, A.G.A. and N.K.S. Yadav, for the Respondent

Final Decision: Dismissed

Judgement

Vinod Prasad and Y.C. Gupta, JJ.

All the three appellants Aslam (A-1), Imtiaz (A-2) and Badruddin @ Yusuf (A-3) have approached this Court being aggrieved by the judgment and order of their conviction dated 5.5.2006 passed by Additional Sessions Judge/Fast Track Court No. I, Mirzapur, in two connected Sessions Trials, S.T. No. 142 of 2001, State v. Aslam and others, u/s 302/34, I.P.C. and 7 of Criminal Law Amendment Act (relating the crime No. 929 of 2000) and S.T. No. 143 of 2001, State v. Aslam, u/s 25. Arm"s Act (relating to crime No. 5 of 2001), both relating to P.S. Kotwali Katra, District-Mirzapur. Learned trial Judge after vetting the evidences tendered before it, collating facts and circumstances of the incident in question has convicted all the appellants u/s 302/34, I.P.C. and 7 Criminal Law Amendment Act and has sentenced them to imprisonment for life with Rs. 10,000 fine and in default in payment of fine to undergo six months further R.I. for the first charge and

4 months R.I. for the second charge. Both the sentences were directed to run concurrently by the learned trial Judge. Hence this appeal challenging the said conviction and sentences. Prosecution story narrated briefly, as was stated in the written F.I.R., Exhibit Ka-1, narrated during investigation and subsequently deposed during Sessions Trial were that one Aslam Khan was a resident of village Chitawanpur which is at a distance of 4 Kms. from Kazi Talab, Jangi Road. Aslam Khan had five sons Adam, Azam, Daud, Munaf (informant), Mumtaz and Mustaq (deceased). Zubair Khan is the son of Adam Khan and Parvez Khan, eye-witness of the incident and scribe of the F.I.R. is his grandson being son of Zubair Khan. Mustaq Khan (deceased) had five sons, out of whom one was mentally unsound. Rest of his sons are Mustaq, Haider, Tauhid and Shahmir. To complete the narration of pedigree, it is pointed out that appellant Badruddin and Imtiaz are real brothers being sons of Mohd. Haq @ Mak and appellant Aslam belongs to a different family. As a motive for the present crime it was alleged that Mustaq (deceased) alongwith his aforesaid four sons had committed murder of Asif @ Sonu, aged about 9-10 years of age, eldest son of appellant Aslam Khan (A-1) one and half or two years prior to the present incident and trial of that crime was proceeding on the date when the present incident occurred.

2. On 20.12.2000 at 9.30 a.m., informant Munaf Khan, P.W. 1, alongwith deceased Mustaq, his son Parvez (P.W. 2) and Nasib were going to Mirzapur, P.W. 1 and 2 were on one cycle, whereas Nasib was another cycle. Deceased was on a third cycle. Deceased was going to the courts in connection with pairvi of the case of his son, whereas rest of the three were going to nursing home of Dr. Meena Vishwakarma to see Farzana, informant's daughter, who was blessed with a girl child on 18.12.2000, two days prior to the present incident. At 9.30 a.m., when all the four of them reached at Kazi Talab Jangi Road, in front of shop of Rajendra Vishwakarma, carpenter, then all the three accused-appellants approached them from behind on a Suzuki motorcycle and rounded up Mustaq (deceased). Each one of them, then shot at Mustaq (deceased) from their country made pistols from point blank range causing him three fatal gunshot injuries, as a result of which Mustaq, squatted on the ground and died instantaneously. Assailants thereafter started brandishing their weapons to terrorise people, who started running hither and thither. Doors of the houses and shutters of the shops were pulled down. When informant and others tried to apprehend murders, they were threatened with life and, therefore, terror stricken witnesses because of fearsome psychosis could not muster enough courage to apprehend the culprits and kept themselves at bay. After committing deceased's murder accused escaped on their motorcycle.

3. After the incident, Munaf Khan P.W. 1 got scribed incident F.I.R. Ext. Ka-1, from his grandson Parvez Khan, P.W. 2 and carried it to the Police Station Katra Kotwali, Mirzapur, at a distance of one mile and lodged it the same day at 10.30 a.m., as crime No. 929 of 2000, u/s 302/34, I.P.C. and 7, Criminal Law Amendment Act.

4. Constable Shamshad Ansari, P.W. 3, registered the crime by preparing chik F.I.R. Ext. Ka-5 and G.D. Entry Ka-6 and S.H.O. Surendra Tiwari P.W. 5 immediately took over the

investigation.

5. Investigating Officer, P.W. 5, first of all copied Exts. Ka-5 and 6, and thereafter came to the murder spot from where he collected bloodstained and plain earth, sealed it and prepared recovery memo Ext. Ka-3, which was signed by P.W. 1 and 2 both. Cycle of the deceased by which he was going to the court was seized and handed over to P.W. 1 and seizure memo Ext. Ka-2 was penned down. Investigating Officer, P.W. 5, thereafter recorded statements of P.W. 1 and P.W. 2. At the pointing out of the informant, spot inspection was conducted by the Investigating Officer Who also prepared the site plan map Ext. Ka-9. Accused-appellant Badruddin thereafter was arrested on 21.12.2000 and his statement was recorded. On 22.12.2000, Investigating Officer copied the post-mortem examination report of the deceased and on the subsequent day 23.12.2000 interrogated witness Nasib. Other witnesses of locality Amrit Lal and Riaz were interrogated by him and thereafter on 27.12.2000 witness Tasdique was interrogated and his statement was noted. On 2.1.2001, rest of the two appellants Aslam (A-1) and Imtiaz (A-2) were arrested from trisection of Baraudha Kachar at 1 p.m. alongwith Suzuki Motorcycle U.A.D. 394, which was used during the crime by the accused persons. From the possession of appellant Aslam (A-1), a country made pistol of .315 bore, a live and an empty cartridges were recovered. One more live cartridge was fixed in the barrel of the country made pistol. The recovered weapon and cartridges were seized and a recovery memo was dictated to S.S.I. H.N. Pandey, which was signed by the Investigating Officer and other witnesses, which is Ext. Ka-10, Seal impression was also prepared. Recovered weapon was also dispatched for forensic test after obtaining courts order. Country made pistol, live and empty cartridges are material Exts. 2, 3 and 4. Bullets recovered from the cadaver of the deceased are material Exts. 5 to 7. Testing cartridges are Exts. 8, 9, 10 and 11. Forensic science laboratory report is Ext. Ka-11. Blood stained attires of the deceased, Exts. 14, 15, 16, 17, 18 and 19, which was sent by the post-mortem doctor were also sent for chemical testing alongwith blood stained and plain soils, Exts. 12 and 13, and report in it's respect is Ext. Ka-12, which all has been proved by Investigating Officer, P.W. 5. The motorcycle, which was used in the crime was challaned under the Motor Vehicles Act. After copying the inquest memo and other relevant papers prepared by P.W. 6, and concluding investigation P.W. 5 charge-sheeted all the accused vide Ext. Ka-13.

6. Under the guidance of the Investigating Officer P.W. 5, S.I. Shiv Prasad Chandra, P.W. 6, had conducted inquest on the cadaver of the deceased and prepared inquest memo Ext. Ka-4. Other relevant papers, copy of chik Ext. Ka-14, Letter to C.M.O., Ext. Ka-15, Letter to R.I., Ext. Ka-16, Seal sample, Ext. Ka-17, Form No. 13, Ext. Ka-18, Form No. 33, Ext. Ka-19, Sketch of cadaver, Ext. Ka-20, were also prepared by P.W. 6, who has proved it all. After the inquest proceeding was performed, corpse was sealed and was handed over to constable Dayakant Yadav and Sarvajeet to be carried to the mortuary for autopsy purposes.

7. Crime against the appellant Aslam (A-1) u/s 25, Arms Act was registered as Cr. No. 5 of 2000, u/s 25, Arms Act, vide chik No. 2 of 2001 vide Ext. Ka-21 by C.P. Mohan Prasad Gupta, P.W. 7. The said crime was registered in the G.D. by Constable Moharrir Kamla Shankar Pandey, P.W. 8, at 2.55 p.m. on 2.1.2001. Copy of said G.D. is Ext. Ka-22, S.I. Makhan Lal Kanaujiya, P.W. 9 had investigated the said crime, interrogated the witnesses and recorded their statements and had prepared site plan map Ext. Ka-13, and concluding it had charge-sheeted accused-appellant Aslam (A-1) vide Ext. Ka-24. Sanction to prosecute the said appellant accorded by the District Magistrate Sri Chandrama Prasad, on 30.1.2001 is Ext. Ka-25.

8. Autopsy on the corpse of the deceased was conducted by Dr. K.K. Kanaujiya P.W. 4 on 21.12.2000 at 3.15 p.m. and he had prepared postmortem examination report Ext. Ka-8. In doctors estimation deceased was having average built, and rigor mortis was present in his both the extremities. In his thoracic cavity blood clots were present. In the stomach semi digested food was present whereas small intestine had gases and large intestine had fecal matter and gases. Doctor had noted following ante-mortem external physical injuries, which were sustained by the deceased:

Fire arm injury.--(1) Entry wound 8 cm. x 3 cm. burst like injury up to right lip corner to right cheek maxillary and mandible bone multiple fracture. One bullet received deep In the mouth.

(2) Entry wound 1 cm. x 1 cm. in left chest 3 cm. below and medially from left clavicle bone, and 3 cm. left side from sternum 9 cm. distance upper medial side from left nipple. Edge inverted and slight bleeding present and tattooing absent.

Tract.--Bullet enter and touch rib and coming low skin near left nipple, one bullet recover below skin near left nipple.

(3) Entry wound 1 cm. x 1 cm. in the middle chest at a distance from right nipple 9 cm. to middle. Edge inverted. Slight bleeding present and tattooing absent.

Track Bullet enter and fracture IIIrd rib of right side and rupture right lung and go left side near second rib (left) at back chest.

Bullet recover in back chest.

9. Laid charge-sheet in court by the Investigating Officer against accused-appellants resulted in registration of case against them in the committal court of C.J.M., Mirzapur, who after summoning of the accused-appellants committed their case to the Sessions Court for trial on 13.3.2001.

10. Learned trial Judge/Additional Sessions Judge, charged the appellants u/s 302/34, I.P.C. and 7, Criminal Law Amendment Act, which charges were read out and explained to them, and since all the accused appellants abjured those charges and claimed to be

tried consequently to bring home their guilt, their trial commenced by resorting to sessions trial procedure by the learned trial Judge.

11. Prosecution in an effort to substantiate framed charges and establish appellants' guilt relied upon oral testimonies of nine witnesses, out of whom informant Munaf Khan P.W. 1, scribed and eye-witnesses Parvez Khan P.W. 2 are the two fact witnesses. List of former witnesses consists of constable Shamshad Ansari P.W. 3, Dr. K.K. Kanaujiya P.W. 4, Inspector, Investigating Officer Surendra Tiwari P.W. 5, S.I. Shiv Prasad Chandra P.W. 6, constable Mohan Prasad Gupta P.W. 7, constable Kamla Shankar Pandey P.W. 8 and S.I. Makhan Lal Kanaujiya P.W. 9.

12. Accused in their statements u/s 313, Cr. P.C. took a common defence of their false implication because of the existing enmity. They further stated that two fact witnesses were related, inimical, partisan and got up witnesses and they had falsely implicated them in a fabricated case after deceased was shot dead by unknown assailants. None of the two witnesses were present at the incident scene and F.I.R. is ante timed and ante dated. To substantiate their defence claim that the prosecution story had not seen light of the day prior to conducting of inquest, as alleged by the prosecution, they had examined S.I. Ram Adhar Rai, D.W. 1.

13. As has already been mentioned herein above, learned trial Judge/Additional Sessions Judge/F.T.C. 1st, Mirzapur, through impugned judgment and order, held the appellants guilty u/s 302/34, I.P.C. and 7, Criminal Law Amendment Act and therefore, convicted them for both the crimes and sentenced them, as has already been recorded in the opening paragraph of this Judgment and hence is being eschewed from being repeated and consequently challenge in this appeal has been made to the aforesaid judgment and order by all the convicted and sentenced accused.

14. On the aforesaid sketched background facts, we have heard Sri V.P. Srivastava, learned senior counsel assisted by Sri Dharmendra Vaishya, advocate for the appellants, Sri D.R. Chaudhari, learned counsel for the informant and Sri N.K.S. Yadav, learned A.G.A. for respondent State for and against this appeal and have ourselves perused and vetted through oral and documentary evidences existing on the trial court record.

15. Assailing the impugned judgment and snipping the prosecution story and evidences and castigating it, it was vehemently argued on behalf of the appellants that none of the two fact witnesses were present at the spot. They, after receiving the message of deceased murder, came to the murder spot, saw the dead body and after inquest was over, that they, in consultation with the police, feigned and fabricated F.I.R. version to nail in the appellants because of existing rivalry. F.I.R. saw the light of the day after inquest was over and was registered ante time. No independent witness nor even of resgestie came forward to lend credence to the prosecution story which casts a serious doubt on the genuineness of the prosecution version. Two fact prosecution witnesses examined during trial, Munauv Khan P.W. 1 and Parvez Khan P.W. 2 both are related, inimical,

partisan, planted and got up witnesses and their testimonies are unreliable to which no credence can be attached harangued learned counsel. Facts as are mentioned in the inquest memo are at variance with facts recorded in chik F.I.R. and G.D. entry and hence defence suggestion is quite probable on preponderance of probabilities submitted learned counsel. On the second page of the inquest memo no crime number etc. is mentioned which indicates that F.I.R. was not in existence at the time when inquest was conducted. Munauv Khan P.W. 1 and Parvez Khan P.W. 2 were endeavoured to be made omnipresent at all stages of investigation and were made witness of inquest as well as of the recovery and, therefore, all endeavour of the Investigating Officer was to suppress actual incident and consequently, analyzing on the touch stone of probability and acceptability, none of the facts witnesses should be relied upon is the argument, which was raised before us. It is further contended that the story that informant was proceeding towards the nursing home of Dr. Meena Vishwakarma alongwith other witnesses, was never divulged to the Investigating Officer during the investigation nor was sketched when the F.I.R. was being scribed and, therefore, the same is an embellished concoction, which should be discarded from consideration as being a fabricated version is yet another criticism by the appellants" counsel, Primarily, on these submissions, learned senior counsel contended that the case of the prosecution has not been established by cogent, reliable and creditworthy evidences and the appeal deserves to be allowed and appellants be acquitted. On the motive part, it is urged that prosecution witnesses had enough and compelling reasons to frame the appellants in a teradiddle as, because of murder case of son of appellant Aslam, two of the accused were still languishing in jail and one of them was absconding. Therefore, there was enough reason for the prosecution to avenge the said crime by implicating the appellants in the present incident.

16. Both the respondent counsels submitted to the contrary and canvassed that it was a day light incident with eye-witness account, prompt F.I.R. and consistent medical evidence and consequently, entire prosecution story coalescenced together present a conglomerated credible version without any embellishment or concoction and, therefore, conviction of the appellants is well merited, and does not call for any interference by this court. It should be affirmed as no contrary view, than what has been taken by the learned trial Judge in the impugned judgment, is possible contended learned A.G.A. They, therefore, argued that the appeal lacks merit and be dismissed in full.

17. We have considered the arguments by both the sides in the light of oral and documentary evidences and summated and collated the facts and circumstances of the appeal. From our such an exercise we find that some vital and important facts of the prosecution story remains un-challenged. These facts include date, time and place of the incident and murder of the deceased by gun fire. Since accused have not challenged these vital facts, they have to be taken as proved beyond doubt. Learned senior counsel has also not addressed and harp much on these aspects and hence there is no difficulty in concluding that the deceased was done to death on the date, time and place alleged by the prosecution and had prosecution has discharged it's initial burden of proof by

tendering credible evidences. Thus, the question which remains to be adjudicated and bone of contention is as to whether appellants were involved in the crime and orchestrated it or it was committed by unknown persons unnoticed by the witnesses.

18. When prosecution evidences is summated to verify the veracity of above aspect it transpires that from the initial stages prosecution version is consistent that it were the appellants who had executed the murder. At no point of time during the trial both the witnesses budged from their such an allegation. They were subjected to serious tests in cross-examination but the defence failed to dislodge their allegations. Learned appellant counsel castigated their testimonies for the reasons that neither in the F.I.R. nor during investigation it was divulged by them that they were proceeding to the nursing home of Dr. Meena Vishwakarma and that the deceased was going to the court in connection with the murder of his son. It was further argued that even on the first day of his examination informant had not brought the documentary evidences from nursing home and it was only on the subsequent day of his deposition that he had brought the documents and, therefore, the entire story of going to nursing home is a fabricated version. Second reason for castigation is that the inquest report contained some different noting than the chik F.I.R. and G.D. entry. The noting, which were pointing out is in respect of distances mentioned in the chik F.I.R. and inquest report from the police station to the place of occurrence and none mentioning of crime number on the second page of the inquest memo. It was further pointed out that on the second page of inquest memo wrong Rapat No. was mentioned as Rapat No. 21, whereas the crime in question was registered vide Rapat No. 22, because F.I.R. was not in existence when inquest was conducted on the cadaver of the deceased.

19. Dealing with both the submissions in seriatim, we first take up the castigation regarding omission In the F.I.R. and 161, Cr. P.C. statement about proceeding towards nursing home on cycles and deceased going to the court. The testimonies of both the witnesses are that informant's daughter Farzana was blessed with a female child in the nursing home two days prior to the incident and both the witnesses and their companion were going to see her when this incident happened all of a sudden without their knowledge. P.W. 1 had lost his brother whereas P.W. 2 has lost his father in a most dare devil act in day light on a busy road. Informant had rushed to the police station to register his F.I.R. without any delay, as just after one hour it was lodged after it was scribed meanwhile. Thus, there was no time left for the two witnesses to manufacture a false story. They must have taken some time to compose themselves and come out of the deleterious shock of losing their most dear one. How then it can be expected from the informant to act with such prudence so as to record each and every minute detail in his F.I.R. Without wasting any time he dictated what was absolutely necessary to get his F.I.R. registered in Ext. Ka-1. It was also deposed by P.Ws. 1 and 2 that they were on same cycle whereas deceased and other witness were on separate cycles and when the deceased was shot at he was on the other side of the road in front of Rajendra Vishwakarma's carpenter shop. They in no uncertain terms had stated that they were

proceeding towards Mirzapur. Considering the fact that a real brother and a son had lost their real sibling brother and father, the omission pointed out by the appellants' counsel seems to be wholly insignificant and insipid. F.I.R. contains narration that the entire area was engulfed with terror and insecure atmosphere. In such fact scenario it was not expected of the informant to mention ignorable facts in his F.I.R. Natural omission indicates that the F.I.R. is neither embellished nor fabricated and rule out defence suggestion of it being cooked up, which chance to our mind was very remote and scanty. F.I.R., therefore, was prompt which lends assurance to the prosecution story. It is categorically mentioned in the F.I.R. Ext. Ka-1 that the informant and the deceased were proceeding towards Mirzapur. Coming to omission in 161, Cr. P.C. statements it is to be observed that it shows that prosecution and witnesses have not endeavoured to expatiate their story and introduce facts. We, therefore, do not find that omission to mention proceeding towards nursing home and court by the witnesses and the deceased in any way affects the authenticity and credibility of the prosecution case and veracity of testimonies of P.Ws. 1 and 2. On such facetious reasons we are not inclined to throw out entire prosecution story and discard eye-witnesses testimonies as unreliable. For the above reasons we hereby repel appellants first submissions.

20. Coming to the second snipping regarding discrepancies in distance and Rapat No. in inquest memo and chik and G.D., we find that no doubt there is some differences and these mistakes do occur in the documents, but the reasons for these are very evident and obvious. Rapat Nos. 21 and 22, both were related with the same incident of murder of the deceased. While Rapat No. 21 was dispatched from Mandi Samiti police out post, which was hundred paces away from the place of the incident, vide Rapat No. 22 F.I.R. Ext. Ka-1 was registered. Rapat No. 21 was a cryptic information. Inquest was conducted by P.W. 6, whereas P.W. 5 had investigated the crime. Thus because of slip of pen, if Rapat No. 21 is mentioned in the inquest memo, instead of Rapat No. 22, it does not affect prosecution case at all. Similarly instead of mentioning distance between place of incident and police station, by mistake it was mentioned in the inquest memo the distance between village of the deceased and the place of the incident. These are insignificant errors because of which eye-witness account testified for the murder of most dear ones, who had no reason to spare the real assailants cannot be ignored and discarded. Such petty and trifling mistakes cannot be burgeoned to absolve, perpetrators of a day light murder crime, of their guilt. In such a view, these insignificant contradictions occurring in the inquest memo without any supporting evidence, does not appeal to reason to castigate the entire prosecution story. It has already been observed herein above that F.I.R. is prompt and seems to contain actual narration about the incident and hence prosecution case cannot be doubted because of such inchoate and tenuous assailing. Special report was also dispatched with promptness at 11.30 a.m. which further lends support to the prosecution case.

21. Ocular testimonies of P.Ws. 1 and 2 is corroborated by autopsy report Ext. Ka-8 and deposition by doctor K.K. Kanaujia P.W. 4. Injuries as noted in the post-mortem

examination report were sufficient to cause death in ordinary course of nature and deceased had expired soon after sustaining those injuries and hence act of the appellants is well within the ambit of murder punishable u/s 302, I.P.C. Defence has not been able to point out discrepancies galore to make appellants conviction indefensible. It has also failed to extricate appellants and point out that, but for the appellants anybody else would have motive to commit deceased murder. Contrary to it, appellants had sufficient motive to avenge the death of Aslam's son. In such a view, when the incident had occurred in day light with consistent medical evidence and credible ocular testimonies of close relatives, who had no reason to spare real culprits, we do not find any reason to take a different view from that of learned trial Judge. Wrapping up our discussion, we find no merit in this appeal, which stands dismissed. Appellants are in jail. They shall remain in jail to serve out their sentence.

Let the copy of the judgment be certified to the trial court for it's intimation.